



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Chapter III

[Docket No. FMCSA-2019-0151]

National Association of the Deaf Petition for Rulemaking; Hearing Requirement for Commercial Motor Vehicle Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Petition for rulemaking; request for public comments.

SUMMARY: FMCSA requests public comments on the National Association of the Deaf's (NAD) petition for rulemaking to rescind the requirement for interstate drivers of commercial motor vehicles (CMVs) to be able to hear. NAD also requests that FMCSA amend the requirement that interstate drivers be able to speak, and the rule prohibiting the use of interpreters during the administration of the commercial driver's license (CDL) skills test. NAD believes the origins of the hearing requirement dates to a time of misguided stereotypes about the abilities and inabilities of deaf and hard of hearing individuals and the rules should now be changed.

DATES: Comments must be submitted by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Docket Number FMCSA-2019-0151 using any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the SUPPLEMENTARY INFORMATION section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001, by telephone at (202) 366-4001, or by email at fmcsamedical@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

A. Submitting Comments

If you submit a comment, please include the docket number for this document (Docket No. FMCSA-2019-0151), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email

address, or a telephone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA-2019-0151, in the keyword box, and click “Search.” When the new screen appears, click on the “Comment Now!” button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is customarily not made available to the general public by the submitter. Under the Freedom of Information Act (5 U.S.C. 552), CBI is eligible for protection from public disclosure. If you have CBI that is relevant or responsive to this document, it is important that you clearly designate the submitted comments as CBI. Accordingly, please mark each page of your submission as “confidential” or “CBI.” Submissions designated as CBI and meeting the definition noted above will not be placed in the public docket of this document. Submissions containing CBI should be sent to Brian Dahlin, Chief, Regulatory Evaluation Division, Federal

Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001. Any commentary that FMCSA receives that is not specifically designated as CBI will be placed in the public docket for this document.

B. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2019-0151 in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.transportation.gov/privacy.

I. BACKGROUND

A. The Hearing Standard and the Granting of Exemptions

The current hearing standard under 49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).¹

¹ A hearing requirement has been included in the physical qualifications for commercial drivers since 1940. Cf. 4 FR 2294, 2295 (June 7, 1939).

On May 25, 2012, FMCSA published a notice requesting public comment on the application from NAD for an exemption from the regulatory requirement in 49 CFR 391.41(b)(11) on behalf of 45 deaf drivers (77 FR 31423). The Agency received 570 comments in response to that notice, and 40 of the 45 applicants were granted exemptions (78 FR 7479). Since that time, FMCSA has granted more than 450 hearing exemptions to individuals who do not meet the hearing standard. In doing so, FMCSA has published numerous Federal Register notices announcing receipt of hearing exemption applications and requesting public comment, prior to granting the individual exemptions. *See, e.g.*, 84 FR 5544 (February 21 2019); 84 FR 21392 (May 14, 2019).

B. Speaking Requirement for Interstate Drivers

Currently, § 391.11(b)(2) requires that interstate CMV drivers read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.

The requirement to speak was adopted on December 23, 1936 by the Interstate Commerce Commission (ICC), the Federal agency responsible for motor carrier safety prior to the establishment of the U.S. Department of Transportation. (1 M.C.C. 1, at 18-19).

On May 27, 1939, the ICC made certain changes and additions to the Motor Carrier Safety Regulations, including elimination of the exceptions granted by the original rules for those drivers unable to read and speak English. As stated in that notice, “The intent of the Commission to require such ability of all drivers in this service has been unmistakable since 1937, and the intervening period of more than two years is regarded as sufficient to justify the

removal of the exception.” (14 M.C.C. 669, at 675). The requirements have remained essentially unchanged since the 1930s.

C. Prohibition Against Interpreters During the CDL Skills Test

On May 9, 2011 (76 FR 26854), FMCSA published a final rule amending the CDL knowledge and skills testing standards. The final rule included prohibitions against the use of interpreters during the administration of the CDL knowledge and skills tests. Section 383.133(b)(3) provides that the CDL knowledge tests may be administered in written form, verbally, or in automated format and can be administered in a foreign language, provided that no interpreter is used in administering the test. Section 383.133 (c)(5) prohibits interpreters during the administration of skills tests. Paragraph (c)(5) also states that applicants must be able to understand and respond to verbal commands and instructions in English by a skills test examiner. Neither the applicant nor the examiner may communicate in a language other than English during the skills test.

D. NAD Petition to Change the Rules

NAD petitioned FMCSA to change its safety regulations so that deaf and hard of hearing individuals would be allowed to operate CMVs in interstate commerce. Although FMCSA has granted exemptions from § 391.41(b)(11) concerning physical qualifications for deaf and hard of hearing individuals as noted above, NAD believes the rule should be changed to eliminate the regulatory barrier to these individuals operating CMVs in interstate commerce. NAD also contends that both the hearing requirement for physical qualification to operate a commercial vehicle and the speaking requirement are violations of the Rehabilitation Act of 1973.² A copy of the petition is included in the docket referenced at the beginning of this document.

² 29 U.S.C. 701, et seq.

In granting the exemptions discussed above, the Agency did not provide relief from the requirement that drivers be able to communicate in English and the prohibition against interpreters during the CDL knowledge and skills tests. However, the Agency has provided clarifications on how these requirements should be applied in the context of deaf or hard of hearing individuals.

On December 29, 2017 (82 FR 61809), FMCSA published a notice announcing its response to certain substantive comments submitted to one of the notices regarding the granting of exemptions from the hearing requirement for multiple drivers. The Agency explained that the restriction under 49 CFR 383.133(c)(5) does not mean that a skills test cannot be accomplished with a deaf or hard of hearing individual. The 2017 notice stated:

Generally, FMCSA has addressed this issue in formal guidance, which is found at Question 7 to 49 CFR 391.11(b)(2) (published on October 1, 2014 at 79 FR 59139). The guidance is premised on the position that the term “speak,” as used with the associated rule, should not be construed so narrowly as to find a deaf driver who does not use oral communication in violation of that regulation. Similarly, the term “verbal” in 49 CFR 383.133 should not be construed so narrowly when examiners are administering skills tests to applicants with a hearing exemption, and should be applied to permit communication in forms other than verbal. If the actual skills tests are administered without the aid of an interpreter, the State is in compliance with 49 CFR 383.133(c)(5). Additionally, as noted above, there are no prohibitions against the use of an interpreter prior to the skills test generally or in between the three segments of the test. Use of a skills test examiner who is capable of communicating via American Sign Language is also an option.

II. REQUESTS FOR PUBLIC COMMENTS

After the publication of the December 29, 2017, notice, several motor carriers and CDL training providers shared with FMCSA their concerns about safety when it comes to behind-the-wheel training of deaf or hard of hearing individuals. Behind-the-wheel training requires communication between the instructor and the student while the vehicle is in motion under a variety of conditions. This includes operating on public roads in traffic, and at highway speeds. Given that deaf and hard of hearing individuals rely on sign language, written messages or other

visual indicators, training providers have expressed concerns about safety when the students take their eyes off the road to focus on communication with the instructor.

Motor carriers also raised concerns about work-place safety with such individuals. Safety concerns include identifying effective alternatives to audible alerts and warnings for hazardous conditions, such as trucks backing around loading docks and driven around terminals.

The FMCSA requests public comments on NAD's petition for rulemaking, with a focus on five areas of concern:

Safety During CDL Training

FMCSA's hearing requirement is applicable to individuals who operate CMVs (as defined in 49 CFR 390.5) in interstate commerce, regardless of whether they are required to have a CDL. There are also some regulatory exemptions from the physical qualification requirements. See, generally, 49 CFR 390.3(f) and 391.2. Therefore, some individuals seeking CDL training have not been, and would not be, subject to the hearing standard. This includes, for example, individuals that drive or plan to drive for Federal, State or local government agencies that do not impose the same physical qualification requirements on their employees, etc. What actions have CDL training providers, including governmental entities providing such training, taken to address the needs of CDL applicants seeking employment opportunities in transportation sectors that are exempt from FMCSA's physical qualifications standards and to what extent would these practices be helpful to training providers preparing drivers to operate in sectors subject to FMCSA's physical qualifications standards? How do CDL training providers ensure safe operations during behind-the-wheel training of deaf and hard of hearing individuals on public roads?

CDL Skills Test Administration

With the granting of hearing exemptions as discussed above, some State Driver Licensing Agencies (SDLAs) have raised concerns about challenges administering the CDL skills test to deaf and hard of hearing individuals. The SDLAs expressed concern that the prohibition against interpreters during the skills test precludes the administration of the tests if the CDL examiner is not capable of communicating with sign language.

In addition, SDLAs have expressed concerns about safety of operations when the CDL examiner must communicate with the applicant while the vehicle is in operation on a public road.

FMCSA requests information from the SDLAs concerning challenges their examiners have experienced administering the CDL skills test under such circumstances and what accommodations, if any, have been made to complete the skills test while complying with the prohibition against the use of interpreters. The Agency also requests comment on steps taken to address or minimize the time applicants must take their eyes off the road to receive instruction or feedback from the CDL examiner.

Workplace Safety

FMCSA has statutory direction to ensure that operation of a CMV does not have a deleterious effect on the health of CMV operators. To consider the impact of a change in the hearing requirement on driver health, the Agency requests comments from motor carriers about their concerns about ensuring the safety of deaf and hard of hearing individuals at facilities where trucks are loaded and unloaded, and terminals at which trucks may be operated with workers walking around. Under such scenarios, deaf or hard of hearing individuals would not be able to hear audible alarms or signals of workplace hazards. The Agency requests information about safety precautions that are being taken to accommodate such individuals and the experiences of these employers with workplace incidents and injuries.

Safety Impacts If FMCSA Grants NAD's Petition

In consideration of the areas highlighted above, the Agency request comments on whether the Agency should grant NAD's petition for rulemaking, in whole or in part, and initiate a notice-and-comment rulemaking proceeding. The Agency seeks information on whether a regulatory change would significantly increase the number of individuals seeking training and employment as interstate CMV drivers. Also, would CDL training providers and motor carriers face additional challenges if the population of deaf and hard of hearing individuals seeking entry into the industry increased significantly?

Granting of Hearing Exemptions

As noted above, the Agency has granted more than 450 hearing exemptions since 2012. The exemptions cover a range of circumstances necessitating relief from the hearing standard, from individuals with CDLs in need of an exemption to allow them to operate in interstate commerce, to individuals seeking a CDL to begin a career in the interstate motor carrier industry. The exemptions also cover individuals interested in operating CMVs for which a CDL is not required. If FMCSA denies the NAD petition for rulemaking, should the Agency continue granting exemptions, or consider limiting the exemptions to certain categories such as individuals intending to operate CMVs for which a CDL is not required, or individuals who already hold a CDL?

Issued under authority delegated in 49 CFR 1.87 on: December 10, 2019

Jim Mullen

Acting Administrator

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